Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

OFFICE OF THE CLERK

YUASA, INC.,

Petitioner,

v.

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL SALARIED MACHINE AND FURNITURE WORKERS, AFL-CIO, LOCAL 175,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

(1) Whether the Fourth Circuit erred in holding, contrary to longstanding authority of this Court, that it is a union's grievance, rather than the parties' collective bargaining agreement, that "serves as both the source and limit of the arbitrator's authority and power."

(2) Whether the Fourth Circuit erred in holding, contrary to longstanding authority of this Court, that an arbitrator who, by the express terms of the parties' collective bargaining agreement, has "no authority to add to or subtract from or modify any of the terms of the Agreement," nonetheless acts within the bounds of his authority by changing an express mathematical formula contained in the contract in order to relieve the union of a bargain which, in his view, "it cannot responsibly have accepted."

LIST OF PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceedings in the district court and court of appeals.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Yuasa, Inc. respectfully represents to the Court that it is a privately-owned corporation, incorporated in Delaware. It is a wholly-owned subsidiary of Yuasa, Inc., a Pennsylvania corporation. Yuasa, Inc. (Pennsylvania) is a wholly-owned subsidiary of Yuasa Capital, Inc., a Delaware corporation. Yuasa Capital, Inc. is a wholly-owned subsidiary of Yuasa Holdings, Inc., a privately-owned Delaware corporation. No publicly held corporation directly owns 10% or more of the stock of Yuasa Holdings, Inc. or any of its subsidiaries. In the interest of full disclosure to the Court, however, it is noted that more than 10% of the stock of Yuasa Holdings, Inc. is owned by Morgan Stanley Dean Witter Venture Capital Partners, L.L.P., which is affiliated in some manner with Morgan Stanley Dean Witter & Co., a publicly held corporation.

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YUASA, INC.,

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INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL-CIO, and its LOCAL 175,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Yuasa, Inc. ("Yuasa" or "Company") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATION TO REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Yuasa, Inc. v. International Union of*

Electronic, -Electrical, Salaried, Machine, and Furniture Workers, AFL-CIO, Local 175, 224 F.3d 316 (4th Cir. 2000), is set forth in the Appendix hereto (App. 1). The unreported opinion of the district court is set forth in the Appendix hereto (App. 15). The unpublished award of Arbitrator Robert J. Ables is set forth in the Appendix hereto (App. 39).

JURISDICTION

This action was brought in the district court pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking judicial review of an arbitration award. The district court granted summary judgment in favor of Yuasa. International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL-CIO, and its Local 175 (collectively, "Union") took a timely appeal to the Fourth Circuit on the basis of 28 U.S.C. §1291. The Fourth Circuit entered its judgment reversing the district court on August 21, 2000. A petition for rehearing and rehearing *en banc* was denied on September 19, 2000. (App. 58). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Yuasa manufactures commercial lead-core batteries at its plant in Sumter, South Carolina. At all relevant times, the Company and the Union have been parties to a collective bargaining agreement whose term is from April 12, 1998, until April 15, 2001 ("Agreement"). (App. 17). The Agreement contains a grievance procedure. Article XIII, Section 1 of the Agreement states, in relevant part:

> In order to avoid misunderstandings, the written grievance must cite the specific clause of the Agreement which is claimed to be violated and the remedy which is being sought. Violations of other contract provisions cannot be alleged after the grievance is submitted.

(App. 18).

Article XIV of the Agreement sets forth the agreed-upon arbitration procedure. Section 4 of that Article expressly limits an arbitrator to only those matters "specified in the written grievance." That section also sharply limits an arbitrator's power by providing that he "shall have no authority to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto." (emphasis added). (App. 18).

Incorporated into the Agreement is a document referred to as "Attachment C," which sets forth the terms of an incentive plan known as the "Gainsharing Program." One component of the Gainsharing Program involves determining the quality of work product at the plant. The measurement of quality, as set forth in Attachment C, is known as First Pass Yield ("FPY"). (App. 18-19). Attachment C provides the specific formula for calculating FPY in each department. For the Grid Casting department, which is the sole

department focused on by the Arbitrator, Attachment C expressly sets forth the precise mathematical formula for calculating departmental FPY:

> FPY=(Good Product - External Scrap) / Counter number. Numerator: The Good Product comes from product that is counted by the operator and entered on the production report. External Scrap is product identified on M90 reports by operators in subsequent processes. **Denominator: The Counter is attached to the grid casting machine and counts each ladle pour as it is made. The units of measure are grids.** (Emphasis added).[1]

(App. 19). The Agreement does not expressly provide a formula for calculating FPY on a plantwide basis.

The Union filed a grievance challenging Yuasa's practice of calculating plantwide FPY by multiplying the FPY numbers of each department.[2] (App. 21). Notably, the grievance did not, in any way, challenge the mathematical formula for calculating FPY in the Grid Casting department. As set forth in the grievance, the Union sought to have

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[1] The crux of the instant dispute revolves around the Arbitrator's unauthorized action in changing the formula from "FPY = (Good Product - External Scrap)/Counter Number" to "FPY = (Good Product - External Scrap)/(Counter Number - Defective Pours)," and the Fourth Circuit's approval of that change.

[2] Contrary to the Fourth Circuit's assertion that the Union was "unable to resolve the dispute through negotiation" (App. 5), the record contains absolutely no evidence that the Union ever attempted to resolve the dispute concerning FPY through bargaining, despite the fact that the parties included a "reopener" provision in the Agreement expressly for that purpose.

Yuasa "average", rather than multiply, the departmental FPY numbers. (App. 21). The Arbitrator recognized this as the issue before him, stating:

> As argued, the union maintains that the FPY [First Pass Yield] for the plant (which is the product of the quality of work in the eight departments) should be determined by averaging the efficiency of each department; the employer maintains such result should be determined by multiplying the result in each department.

(App. 43).

In accordance with Article XIII, Section 1 of the Agreement, the Union's grievance specified the remedy it was seeking as follows:

> Determine 'First pass yield' by using Average of each Department added and divided by the number of Departments. (Dept. as identified in Attachment C).

(App. 22). Again, the grievance did not request that the formula for calculating FPY for any individual department be modified by the Arbitrator. As noted by the Arbitrator, the Union simply asked that the Company be ordered to re-calculate monthly plant-wide FPY by averaging department FPYs. (App. 43).

The Arbitrator concluded that the multiplication -- not averaging -- of FPYs for each department was the historic and correct method of calculating plantwide FPY. (App. 46). He thus affirmed the Company's method for deriving plantwide FPY and denied the Union's stated grievance. (App. 55).

The Arbitrator did not confine himself, however, to the singular question presented by the grievance. Rather, he noted that during almost one year of operation under the Program, employees had received incentive pay in only three months and were making about $2.00 less per hour than under the former plan. (App. 52). Having thus determined that there might be a "glitch" in the Gainsharing Program, he took it upon himself to examine the ultimate fairness of the program in operation.

The Arbitrator attributed the failure to earn incentive pay under the Gainsharing Program to an anomaly in the calculation of FPY in the Grid Casting department. (App. 53-55). In his opinion, it was unreasonable to count as "scrap" items over which the grid casting personnel had no control. (App. 55). Thus, he declared that, notwithstanding the correctness of Yuasa's calculation methods, the formula for calculating FPY in the Grid Casting department "needs adjustment." (App. 55). To accomplish the "adjustment," he ordered that the express, contractual mathematical formula for calculation of FPY in the Grid Casting department be modified to sub.ract from the "Counter number" specified in the Agreement those defective grid pours that arose because of non-operator error. (App. 55). Finally, despite having earlier sustained Yuasa's method of calculating FPY, the Arbitrator ordered that all employees should receive back pay based on the new, "adjusted" formula. (App. 55).

Yuasa instituted this action in district court on June 22, 1999, seeking judicial review of the arbitration award ("Award") (App. 39). Specifically, the Company sought to vacate and set aside part of the Award, as well as to obtain declaratory and injunctive relief against the Union. The Union filed a timely opposition to the Company's motion and, on August 13, 1999, filed its own motion for summary judgment, seeking full enforcement of the Award.

The district court construed the parties' motions as cross-motions for summary judgment under Rule 56,

F.R.C.P., and on November 24, 1999, entered its order granting judgment for Yuasa. The court found that the "singular" question before the Arbitrator was whether plantwide FPY should be calculated by using the multiplication or averaging method. (App. 23). It determined that the Arbitrator exceeded his authority under the collective bargaining agreement by rewriting an essential contract term and that the Award failed to draw its essence from the contract. (App. 16, 38). Thus, it was determined that "the arbitrator's transgressions went beyond the stipulated issues submitted to him and proceeded to the point of rendering an award that does violence to the clear language of the CBA." (App. 16).

A three-judge panel of the court of appeals reversed the district court. Although the district court found that the "singular" question before the Arbitrator was whether plantwide FPY should be calculated by using the multiplication or averaging method, the court of appeals apparently disagreed. Without expressly ruling that the district court's finding was clearly erroneous, it implicitly did so by opining that "[the grievance] is broad and would appear to encompass almost any dispute involving the Gainsharing Plan." (App. 10). The panel then ruled that "it is the grievance that serves as both the source and limit of the arbitrator's authority and power." (App. 10) (emphasis added) (internal citation omitted). Thus, despite the contract's express prohibition against arbitral modification, the court approved of the Arbitrator's rewriting of the mathematical formula in the Agreement, reasoning that, "[i]n the absence of any express limitation or reservation included in the grievance" (emphasis added), it was within the Arbitrator's authority to order that the contractual formula be changed. (App. 10).

REASONS FOR GRANTING THE WRIT

For at least 40 years, this Court has recognized that, while an arbitrator may look for guidance to many sources, his award is legitimate and enforceable only so long as it is based on the exercise of the power and authority conferred on the arbitrator by the parties' underlying collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Indeed, "the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 586 (1960)(Whittaker, J., dissenting).

The Fourth Circuit's ruling below is an abrupt and inexplicable departure from this longstanding precedent. The court's decision expressly substitutes the grievance for the collective bargaining agreement as the source and limit of an arbitrator's authority and power. Rather than requiring that the Arbitrator follow the express limitations on his authority set forth in the contract, the court's opinion declared that the broadest possible interpretation of the grievance - unilaterally drafted by one party - determines the scope of the Arbitrator's jurisdiction and the limits on his remedial authority. On that basis, the court allowed the Arbitrator to rewrite an essential term of the parties' contract and, thereby, to "dispense his own brand of industrial justice." That is in direct conflict with the decisions of this Court. *See, e.g., Enterprise Wheel & Car Corp.*, 363 U.S. at 597 ("an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.").

The district court recognized and properly found that the parties' Agreement expressly limited the Arbitrator to

consideration of the particular issue set out in the grievance. (App. 18). The Fourth Circuit, however, ignored both the district court's factual finding in that regard and the plain language of the Agreement. Thus, the court erroneously determined that, based on some power purportedly derived by implication from the grievance, the Arbitrator had the authority to change the formula for calculating FPY in the Grid Casting department.[3] (App. 14).

The Fourth Circuit's decision effectively leaves employers with no recourse in those instances where an arbitrator is unwilling to stay within the contractual boundaries laid out for him. If, as in this case, language that has been carefully negotiated and drafted by the parties is subject to being rewritten at the urging of only one party, no contract language will be considered off-limits to a sympathetic arbitrator. Arbitrators will be able to circumvent express limitations and rewrite the parties' contract anytime they believe, as here, that the express contractual language produces a result "[the union] cannot responsibly have accepted." As sincerely as an arbitrator may believe that he is doing what is fair and right, the fact remains that such an award does not, as it must, draw its essence from the contract. As this Court has observed, if contractual boundaries were not enforced,

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[3] It is important to note that the effect of the Fourth Circuit's decision is not to change the Agreement's FPY formula prospectively, based on claims raised in the grievance. Rather, the court adopted the Arbitrator's unauthorized directive to change the parties' carefully negotiated formula retroactively to the first day of the Agreement and for its full three-year term.

> an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." [Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959)]. This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 651 (1986).

The Fourth Circuit's opinion contains the puzzling observation that the "resolution of this scope-of-arbitration issue is not entirely free from doubt." (App. 13). That is simply wrong. This Court long ago made it clear that, "[w]hen the arbitrator's words manifest an infidelity to [his] obligation [to abide by contractual restrictions on his authority], courts have no choice but to refuse enforcement of the award." *Id.* The Court should now grant certiorari to safeguard the principle that it is the parties' collective bargaining agreement, not a particular grievance, that serves as both the source and limit of an arbitrator's authority and power, and to ensure that parties to a collective bargaining agreement are able to rely on and enforce the express terms of the contract they negotiated.

1. THE FOURTH CIRCUIT DISREGARDED THIS COURT'S DETERMINATION THAT IT IS THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, NOT THE PARTICULAR GRIEVANCE AT ISSUE, THAT IS THE SOURCE AND LIMIT OF THE ARBITRATOR'S AUTHORITY AND POWER

The Fourth Circuit clearly erred in looking to the Union's grievance to determine the extent of the Arbitrator's authority and power. As was earlier noted, this Court has held that "the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power." *Warrior & Gulf Navigation Co.*, 363 U.S. at 586. It was on this fundamental point that the court of appeals became derailed, and that mistake laid the foundation for the indefensible result that was reached.

To accept the Fourth Circuit's premise would necessarily require a reinvention of the concept of arbitration. Underlying judicial deference to arbitral awards is the principle that the terms of the parties' agreement are controlling. *United States Postal Service v. American Postal Workers Union*, 204 F.3d 523, 527 (4th Cir. 2000). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf Navigation Co.*, 363 U.S. at 582. An arbitrator is "part of a system of self-government created by and confined to the parties." *Id.* at 581.

One presumption underlying the institution of arbitration is that arbitrators will interpret collective bargaining agreements and apply them within the context of the circumstances of a particular dispute. Reliance on this presumption "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the

parties' presumed objectives in pursuing collective bargaining." *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984)(citation omitted). The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be drastically reduced, however, if one party could unilaterally determine the arbitrator's power and authority simply by drafting the grievance that sets the arbitral machinery in motion in such a way that it "trumped" the express terms of a collective bargaining agreement negotiated by the parties.

It is no doubt true that:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he may not sit to dispense his own brand of industrial justice.

Enterprise Wheel & Car Corp., 363 U.S. at 597 (emphasis added). Here, the Fourth Circuit found, albeit incorrectly, that the Arbitrator's "adjustment" of the FPY formula was merely an interpretation of the contract made "in light of circumstances that the agreement did not expressly

address."[4] (App. 12-13). Even if that were true, this Court's longstanding precedent mandates that any contractual limitations on the Arbitrator's remedial authority must, nonetheless, be followed. Thus, because the contract unambiguously prohibits the Arbitrator from changing anything in the contract in any way, his "adjustment" of the mathematical FPY formula, even if because of unforeseen circumstances, was clearly outside the scope of his authority.

The Fourth Circuit attempted to avoid that obstacle by matter-of-factly stating that, "in the absence of any express limitation or reservation included in the grievance," the Arbitrator was permitted to take the action he did. (App. 10). Again, that is simply an inaccurate statement of the law, and it caused the court to compound the error that began when it first looked to the grievance as the source of arbitral authority.

Judicial deference to arbitration does not grant *carte blanche* approval to any decision that an arbitrator might make. Courts retain the obligation to insure that an arbitrator has acted within the contractually-drawn boundaries of his authority. *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 168 F.3d 725 (4th Cir. 1999). Here, the Arbitrator overstepped the express limitations on his remedial authority, and the Fourth Circuit endorsed that action through a gross distortion of the law. Certiorari should be granted to resolve the direct conflict between the Fourth Circuit's decision and the established law of this Court.

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[4] The court of appeals seemed preoccupied with what it referred to as the "broken-machine scenario." (App. 12). There is absolutely no basis in the record for such a scenario. The Arbitrator made no factual finding that any machine was broken or malfunctioning, nor did the district court. Instead, the issue was raised as a hypothetical example by a panel member during oral argument in the court of appeals. The Fourth Circuit then premised its decision on what it concluded to be the proper resolution of the irrelevant hypothetical situation.

2. **THE FOURTH CIRCUIT IGNORED THE ESTABLISHED LAW OF THIS COURT BY DETERMINING THAT AN ARBITRATOR WHO, BY THE EXPRESS TERMS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, HAS "NO AUTHORITY TO ADD TO OR SUBTRACT FROM OR MODIFY ANY OF THE TERMS OF THE AGREEMENT," NONETHELESS ACTS WITHIN THE BOUNDS OF HIS AUTHORITY BY CHANGING AN EXPRESS MATHEMATICAL FORMULA CONTAINED IN THE CONTRACT IN ORDER TO RELIEVE THE UNION OF A BARGAIN WHICH, IN HIS VIEW, "IT CANNOT RESPONSIBLY HAVE ACCEPTED."**

The Fourth Circuit framed the issue as "whether the arbitrator's interpretation of [the Grid Casting FPY] formula drew its essence from the language of the collective bargaining agreement." (App. 9). In doing so, the court completely ignored the undisputed fact that the collective bargaining agreement specifically limits the issue before an arbitrator to the issue raised in the grievance. Instead of addressing this critical limitation, the panel simply moved on to the question of whether the arbitrator merely "interpreted" the collective bargaining agreement in rendering his award.

The district court found that the only issue before the arbitrator was "the singular question of plantwide FPY calculation," i.e., whether plantwide FPY should be calculated using the multiplication or averaging method. (App. 23). Specifically, the district court made a factual finding that

> [T]he arbitrator had not solicited the parties' opinions on the refinement to the Grid Casting FPY calculation. At no time during the submission of the case to the arbitrator, which included post-hearing briefing, did the arbitrator ever intimate that he would refine the FPY calculation in such a manner.

(App. 25).

In reaching its own formulation of the issue, the Fourth Circuit thus ignored the precedent that a district court's underlying findings must stand on appeal unless they are clearly erroneous. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995); *ANR Coal Co., Inc. v. Cogentrix of North Carolina*, 173 F.3d 493, 497 (4th Cir. 1999); *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 128 (4th Cir. 1995).

The court of appeals never ruled that the district court's findings concerning the issue before the arbitrator were clearly erroneous. Instead, it proceeded under the premise that there was something about the Grid Casting department's formula that needed to be fixed.[5] Although not expressly stated as such, this was purely a judgment by the court about the relative merits of the grievance. The fact is that the Arbitrator specifically found that Yuasa's method of calculating FPY (multiplying, rather than averaging) was correct. What he did not like, however, was the result

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[5] In explaining its justification for allowing the Arbitrator to change an express contractual provision, the Fourth Circuit noted, "If the company's method of calculating plantwide FPY is accepted, then any single departmental value below the 85% threshold would defeat a Gainsharing Plan bonus based on 'quality.'" (App. 11). The court thus fell into the same trap as the Arbitrator by ignoring the fact that the parties negotiated a specific mathematical formula for calculating Grid Casting FPY and included it in the collective bargaining agreement.

reached by using the correct formula. For the Fourth Circuit to raise the same concern in its justification for allowing the Arbitrator to change the formula clearly signals that its decision was influenced, at least in part, by its perception of the fairness of the formula negotiated by the parties and specifically set forth in the Agreement.

This Court has long held that such judgments are impermissible. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument that will support the claim." *AT&T Technologies, Inc.*, 475 U.S. at 650 (quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)); *see also Enterprise Wheel & Car Corp.*, 363 U.S. at 596 ("The refusal of courts to review the merits of an arbitration award is the proper approach . . .."). The court of appeals, like the arbitrator, simply decided to substitute its opinion as to how First Pass Yield should be calculated in place of the express, precise mathematical formula negotiated and agreed upon by the parties. In doing so, the court's actions sharply departed from the established precedent of this Court.

The Fourth Circuit's decision all but ignores the simple fact that there are limits to what an arbitrator may do. In fact, the panel plainly ignored not only the unambiguous precedent of this Court, but also of the Fourth Circuit itself that should have compelled it to vacate the offensive portions of the arbitrator's award. For example, in *Champion Int'l Corp.*, *supra*, the arbitrator awarded stabilization bonuses to non-qualifying employees under the employer's severance plan, a decision without express support under either the severance plan or the collective bargaining agreement. Drawing on its earlier statements in *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union,* 76 F.3d 606, 608 (4th Cir. 1996), the Fourth Circuit held that the arbitrator had abdicated his overriding duty to faithfully apply the

provisions of the contract. Because he failed in that duty, his award failed to draw its essence from the parties' agreement.

In *Mountaineer Gas*, the court drew on the previous teachings of this Court and outlined a three-part test under which to review arbitral awards. It found that a court must consider: (1) the arbitrator's role as defined by the collective bargaining agreement; (2) whether the award ignores the plain language of the contract; and (3) whether the arbitrator's discretion in formulating the award comported with the essence of the agreement's proscribed limits. 76 F.3d at 608. In that case, the arbitrator's decision to lessen an employee's punishment ignored the plain language of the agreement. Not surprisingly, therefore, the court condemned the arbitrator for "infusing his personal feelings and sense of fairness into the award" and found that the award failed to draw its essence from the collective bargaining agreement. *Id.* at 610.

As pointed out by the district court in this case, the *Mountaineer Gas* decision may be contrasted with the Fourth Circuit's ruling in *Eastern Associated Coal Co. v. United Mine Workers of America, District 17*, 188 F.3d 501 (4th Cir. 1999), *aff'd.*, 2000 U.S. LEXIS 8083 (U.S. Nov. 28, 2000). In *Eastern Associated Coal*, the parties' Wage Agreement required just cause for a discharge. After an employee was discharged based on a positive drug test, he grieved the termination. The arbitrator ordered the employee reinstated after a suspension without pay. The district court affirmed the arbitrator's decision, reasoning that because neither the Wage Agreement nor the drug policy expressly mandated termination as the proper punishment for a positive test result, the arbitrator reasonably could have found that just cause was lacking. The Fourth Circuit affirmed on the reasoning of the district court.

Viewed together, the decisions in *Mountaineer Gas* and *Eastern Associated Coal Co.* amply illustrate the critical role of the collective bargaining agreement in setting out the

boundaries of an arbitrator's authority. They also illustrate the Fourth Circuit's awareness of the proper state of the law. That makes the court's departure from established precedent in this case all the more glaring.

Had the Fourth Circuit applied the longstanding precedent of this Court and its own *Mountaineer Gas* analysis to the instant facts, it would have had no choice but to conclude that, in the first place, the parties' contract expressly states that the arbitrator is employed merely to apply the contract to the grievance before him, and he is strictly prohibited from changing the agreement in any manner. Second, by changing the mathematical formula for calculating FPY in the Grid Casting department, the arbitrator unquestionably violated the plain language of the contract prohibiting him from doing so. Finally, the arbitrator's formulation of the award in no way comports with the essence of the limits expressly set forth in the contract. Thus, the established law of both this Court and the Fourth Circuit itself stand squarely in the way of the panel's decision.

In the present case, the district court correctly found that the Arbitrator fundamentally misapprehended his task, as evidenced by his reflection that "[the union] cannot responsibly have accepted" an incentive plan that might result in reduced payments to employees. The Arbitrator - and later the Fourth Circuit panel - was unwilling to accept that Union officials agreed to a plan that did not live up to their hopes or expectations. Based on that unwillingness, the Arbitrator, with the approval of the court, rewrote the mathematical formula agreed to by the parties for the calculation of FPY in the Grid Casting department.

The parties agreed that FPY in the Grid Casting department would be calculated using the formula:

FPY = (Good Product - External Scrap) / Counter Number[6]

The panel approved the arbitrator's rewriting of the mathematical formula to:

FPY = (Good Product - External Scrap) / (Counter Number - Defective Pours)

Obviously, this improper modification of the contract is a significant change in the parties' agreement.

The contract expressly prohibited the arbitrator from adding to, subtracting from, or modifying the contract in any way. Yet, that is precisely what he did, and what the Fourth Circuit approved. Despite finding that the Company had correctly calculated plantwide FPY, the arbitrator declared that the formula "needs adjustment." (App. 55). Although the court of appeals attempts to characterize the formula change as "merely interpreting" the contract, there is no escaping the fact that the arbitrator expressly modified the contractual mathematical formula. Indeed, the Arbitrator's own use of the word "adjustment" belies any contention that he was merely interpreting, rather than changing, the formula.

Although the court suggests that the Arbitrator was simply addressing a situation that the contract did not contemplate - the effect on production of a counter reading from a defective machine - that issue was never before the Arbitrator. As was previously noted, there is no evidence whatsoever in the record reflecting any issue related to defective machines or defective counters. Moreover, if that

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[6] There is no dispute of the fact that the parties knew when negotiating the agreement that the counter counts <u>all</u> pours, whether defective or perfect.

had been the case, the parties had included a reopener provision in the Agreement specifically for the purpose of addressing that issue after the first year of the Agreement.

The Arbitrator's "adjustment" of the formula produced a mathematically different equation from the one included in the contract. That simply cannot be reconciled with his obligations and authority under the agreement.

Finally, even accepting, *arguendo*, the court's premise that the Arbitrator was authorized to address the proper method of arriving at the FPY percentage for the Grid Casting department, the Arbitrator still acted outside the scope of his authority. As the district court correctly found, no matter how broad the scope of the grievance before him, the Arbitrator was still bound by the remedial limitations established by the collective bargaining agreement. "One way to test the validity of an arbitration award . . . is to ask whether the award ignored the plain language of the collective bargaining agreement." *Champion Int'l Corp.*, 168 F.3d at 728. Here, the Arbitrator ignored the contractual establishment of a formula for calculating Grid Casting FPY, as well as the specific prohibition against modifications to that contractual formula. On this basis alone, he clearly exceeded his authority, and the award failed to draw its essence from the agreement.

The Fourth Circuit's decision is squarely in conflict with the rulings of this Court and raises deep concerns because it allows arbitrators to create, without the agreement of both parties to a collective bargaining relationship, exceptions to contractual limitations on arbitral power and authority. These concerns are particularly acute where, as here, a court of appeals demonstrates an alarming willingness to depart from decades of established law in order to reach a result that clearly seems driven by its own judgment of the merits of the dispute.

The scenario presented in this case is also one that has high probability of recurrence. The ubiquity of arbitration provisions in collective bargaining agreements across a broad spectrum of industries makes this almost a certainty. *See, e.g., Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 n.11 (1988) (arbitrators are designated by nearly all collective bargaining agreements as the adjudicators of contract disputes); *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40, 42 (1st Cir.) (arbitration clauses are "almost always a feature of labor contracts"), *cert. denied*, 522 U.S. 818 (1997). This Court's reinforcement of its earlier decisions is therefore necessary to provide uniform guidance and ensure consistent results in countless future cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1019

YUASA, INCORPORATED,

Plaintiff - Appellee,

v.

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL-CIO, LOCAL 175,

Defendant - Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Florence.
Cameron McGowan Currie, District Judge.

(CA-99-2003-4-22)

Argued: June 9, 2000
Decided: August 21, 2000
Entered: August 21, 2000

Before WIDENER and NIEMEYER, Circuit Judges, and Irene M. KEELEY, United States District Judge for the Northern District of West Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener and Judge Keeley joined.

COUNSEL

ARGUED: Stephen Marc Koslow, Washington, D.C., for Appellant. Stephen Floyd Fisher, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Greenville, South Carolina, for Appellee. **ON BRIEF:** Paul H. Derrick, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Greenville, South Carolina, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

The question presented in this case is whether an arbitrator exceeded the scope of his authority -- defined both by a collective bargaining agreement and by the grievance presented to him -- when he entered an award in favor of employees at the lead-battery manufacturing plant of Yuasa, Inc., in Sumter, South Carolina. The arbitrator interpreted an incentive plan in the collective bargaining agreement through which the parties intended to reward production quality. Yuasa brought this action to set aside the arbitrator's award, contending that the arbitrator illegitimately went beyond the scope of the grievance and ignored the plain language of the applicable agreement.

The district court vacated a portion of the award, finding that the arbitrator had exceeded his authority in rendering the award. Because we conclude that the arbitrator acted within the scope of the grievance presented to him and arguably construed or applied the collective bargaining agreement, we vacate that part of the district court's ruling setting aside the arbitrator's award and remand for further proceedings.

I

In April 1998, Yuasa, Inc., and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO ("the Union"), which was the exclusive collective bargaining representative for approximately 400 production and maintenance employees at Yuasa's Sumter plant, entered into a collective bargaining agreement, which included the substitution of a "Gainsharing Plan" for the then-existing incentive plan. Under the Gainsharing Plan, the Union agreed to accept a reduction in base pay in exchange for "the opportunity to earn more money than the incentive plan" through bonuses based on four performance criteria: quality, on-time delivery, health, and productivity. The stated objective of the Gainsharing Plan was "to improve long term job security and customer satisfaction by providing the employees with the opportunity to earn additional monies for achieving specified levels of performance, particularly verifiable improvements."

Under the Plan, quality of performance was to be measured by a "First Pass Yield" (sometimes "FPY") determined pursuant to a formula for each of eight production departments in the Sumter plant. When the plant-wide First Pass Yield -- the production yield of "good product" -- equaled or exceeded 85%, each employee would receive a bonus.[1]

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[1] The bonuses agreed to were:

$100 per month if plant-wide FPY was 85%-87.9%;

$150 per month if plant-wide FPY was 88%-89.9%;

$200 per month if plant-wide FPY was 90%-91.9%; and

$250 per month if plant-wide FPY was 92% or higher.

While the method for computing the First Pass Yield in each of the eight departments is expressly set forth in the collective bargaining agreement, the agreement does not specify how the FPY percentages from the eight departments are to be aggregated to produce a plantwide FPY percentage. The Union believed that the yields from the eight departments were to be averaged, and the company believed that the yields from the departments were to be multiplied.

The collective bargaining agreement establishes a grievance procedure for resolving disputes under the agreement. An employee or union steward who fails to resolve a grievance with a supervisor must reduce the dispute to writing. The agreement provides: "In order to avoid misunderstandings, the written grievance must cite the specific clause of the Agreement which is claimed to be violated and the remedy which is being sought." Once a grievance is submitted to a human resources manager, "[v]iolations of other contract provisions cannot be alleged" in that grievance. If the parties are unable to resolve the dispute on their own, either party may refer the dispute for "final and binding" arbitration. "The arbitrator may only interpret the contract and apply it to the particular case presented, as specified in the written grievance," and he has "no authority to add to or subtract from or modify any of the terms of Agreement."

Shortly after the Gainsharing Plan went into effect, a dispute arose between the Union and Yuasa concerning the calculation of bonus pay. The Union filed a grievance on June 22, 1998, charging Yuasa with violating Article XXIV, Section 1, of the collective bargaining agreement[2] and

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2 Article XXIV, Section 1, provides in relevant part:

> The Company shall discontinue the current incentive plan and implement a Gainsharing Plan [which was attached to the collective bargaining agreement as Attachment C] which will provide the opportunity to earn more money than the incentive plan.

describing its grievance as Yuasa's "[v]iolation of the intent of language to determine the percentages for 'First pass Yield.'" The Union requested as relief that the First Pass Yield be determined by "using average of each Department added and divided by the number of Departments." Yuasa had been calculating plantwide FPY by multiplying together the FPY value for each department.

Unable to resolve the dispute through negotiation, the Union pursued its grievance to arbitration, and the arbitrator issued a written opinion sustaining the Union's grievance. While the arbitrator rejected the Union's claim that the departmental rates should be averaged as opposed to being multiplied, he found that Yuasa had violated Article XXIV, Section 1, of the collective bargaining agreement by calculating the FPY in the gridcasting department -- one of the plant's eight departments -- in a manner that frustrated the ability of Union members to earn bonus pay.

Yuasa's Sumter plant manufactures lead-core batteries, and the first step in the manufacturing process is gridcasting, during which lead is melted down and cast into lead grids or lattices, which form part of the core of a battery. After the lead is melted down in a ladle-shaped pot, which is part of the gridcasting machine, the machine pours the lead into molds to form grids. At the same time, a counter on the machine counts each pour. If a grid contains a defect at this early stage in the process, the employees simply throw the defective grid back into the lead pot to be melted down and poured again. After the grid production process is complete, the employees place the finished grids on a pallet where quality-assurance workers later examine the grids for defects.

The collective bargaining agreement sets forth a formula for calculating the gridcasting department's First Pass Yield and defines the components of that formula as follows:

FPY = (Good Product - External Scrap) / Counter number

Numerator: The Good Product comes from product that is counted by the operator and entered on the production report. External Scrap is product identified on M90 reports by operators in subsequent processes.

Denominator: The Counter is attached to the grid casting machine and counts each ladle pour as it is made.

The units of measure are grids.

The arbitrator determined that Yuasa was calculating the gridcasting department's FPY in a manner inconsistent with the intent of the parties as expressed in the collective bargaining agreement. Instead of measuring the quality of product effected by the performance of employees, Yuasa was also counting defective pours that resulted from machine malfunctions not attributable to the quality of employee work, which, the arbitrator found, represented between 20% and 40% of the pours coming out of the machine. The arbitrator concluded that the FPY formula could not be interpreted to include pours resulting from a malfunctioning machine.

In short, the arbitrator sustained the Union's grievance but denied the Union's requested relief, finding that multiplying together the FPY percentages of the eight departments was most consistent with the previous practice of the company and the nature of the productivity incentives under the Gainsharing Plan. The arbitrator instead found that Yuasa was miscalculating the FPY for the gridcasting department and accordingly ordered Yuasa to pay backpay to

Union members as "determined either by agreement of the parties or by this arbitrator who maintains jurisdiction of this dispute."

Yuasa filed this action under § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185, seeking to vacate that portion of the arbitration award which determined that Yuasa had improperly calculated the FPY for the gridcasting department, and the Union filed a counterclaim, seeking to enforce the entire arbitration award. The district court entered an order affirming the award "only insofar as it [found] that plantwide FPY should be calculated by multiplication of individual FPYs," and vacating all other portions of the award. The court concluded that the arbitrator had exceeded the contractually drawn bounds of his authority, first, by addressing an issue -- the calculation of the gridcasting department's FPY -- that was not raised in the written grievance, and second, by failing to draw the essence of his award from the collective bargaining agreement, specifically its formula for the calculation of the gridcasting department's FPY.

The Union filed this appeal, challenging only that portion of the district court's order which set aside a portion of the arbitration award.

II

The parties to this case quickly found themselves in disagreement over how to apply a quality-performance measurement, to which they had agreed only shortly before. The chosen method for resolution of this dispute was arbitration, and the arbitrator provided the parties with that resolution -- one with which Yuasa disagrees. Our function in this type of case is not to review the substance of the arbitration award or even the rationality of the arbitrator's approach but to determine whether the arbitrator arguably functioned within the scope of the powers given him by the

arbitration agreement. Allowing final adjustment of disputes to be achieved through the arbitration process is a policy adopted both by the Labor Management Relations Act, see 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement"), and by the cases interpreting it, see, e.g., United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960). This is because "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

For these reasons, particularly in the labor context, we defer to an arbitrator "as long as the arbitrator is even arguably construing or applying the contract." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987); see also Champion Int'l Corp. v. United Paperworkers Int'l Union, 168 F.3d 725, 728 (4th Cir. 1999). Our province is not to decide the merits of the dispute between Yuasa and the Union, but rather to "determine only whether the arbitrator did his job -- not whether he did it well, correctly, or reasonably, but simply whether he did it." Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606, 608 (4th Cir. 1996). Accordingly, we may vacate an arbitrator's award only if it "violates clearly established public policy, fails to draw its essence from the collective bargaining agreement, or reflects merely the arbitrator's personal notions of right and wrong." Champion Int'l, 168 F.3d at 729. One way we determine whether an arbitrator's award fails to draw its essence from the collective bargaining agreement is to ask "whether the award ignored the plain language of the [agreement]." Mountaineer Gas, 76 F.3d at 608; see also Champion Int'l, 168 F.3d at 729. Summarized succinctly,

> [T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Misco, 484 U.S. at 38.

With these principles in hand, we must decide in this case: (1) whether the arbitrator went beyond the scope of the grievance in deciding the correct application of the gridcasting department's FPY formula, and (2) whether the arbitrator's interpretation of that formula drew its essence from the language of the collective bargaining agreement.

III

The Union contends first that the district court erred in concluding that the arbitrator went beyond the scope of the grievance when he decided the proper application of the FPY formula for the gridcasting department. It argues that the language of its grievance addressing plantwide FPY encompasses also the FPY of the plant's individual departments. Yuasa, on the other hand, contends that the district court was correct because the Union's grievance only implicated the proper method of calculating plantwide FPY under the agreement.

The Union's grievance reads as follows:

> NATURE OF GRIEVANCE: Violations of the intent of language to determine the percentages for "First pass Yield."

The grievance refers to Article XXIV, Section 1, of the collective bargaining agreement, by which the parties agreed to "implement a Gainsharing Plan which will provide the opportunity to earn more money than the incentive plan."

This complaint is broad and would appear to encompass almost any dispute involving the Gainsharing Plan. We have long recognized that it is the grievance that serves as "both the source and limit of the arbitrator's authority and power." Textile Workers Union v. American Thread Co., 291 F.2d 894, 898 (4th Cir. 1961). And in the absence of any express limitation or reservation included in the grievance, we presume that the parties, who agreed to arbitration, agree that the authority to address everything necessary to resolve the particular grievance is conferred upon the arbitrator. See Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1146 (10th Cir. 1982); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273-74 (4th Cir. 1997) (noting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983))). While Yuasa points to the relief requested in the grievance -- which was directed at the proper computation of plantwide First Pass Yield -- as limiting the grievance, any relief requested, by its very nature, is included to redress the grievance, not to limit its scope.

Consistent with Yuasa's argument, the district court in this case characterized the issue before the arbitrator as "the singular question of plantwide FPY calculation." Even if that accurately stated the scope of the issue, we would still conclude that the arbitrator was empowered to determine, as components of that plantwide FPY, the individual

department's FPY values. This is because the plant-wide calculation necessarily implicates the calculations of the individual departments. Indeed, it is the company's manner of calculating plantwide FPY that puts such a great emphasis on the individual departments' FPY values. If the company's method of calculating the plantwide FPY is accepted, then any single departmental value below the 85% threshold would defeat a Gainsharing Plan bonus based on "quality." Thus, when the arbitrator addressed the proper method of arriving at the FPY percentage for the gridcasting department, he acted within the scope of the authority given to him to determine the proper plantwide FPY.

IV

The Union contends also that the district court erred in finding that the arbitrator's award did not draw its essence from the collective bargaining agreement. The Union argues that the arbitrator, faced with a conflict between the stated objective of the Gainsharing Plan and the literal reading of the gridcasting department's FPY formula, was properly authorized to interpret the formula in a manner that avoided the conflict but yet was faithful to the bargain struck by the parties. Yuasa asserts, on the other hand, that the arbitrator ignored the plain language of the gridcasting department's FPY formula and substituted for the agreed-upon formula his "own notions of industrial justice." Misco, 484 U.S. at 38; see also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

The collective bargaining agreement provides that the First Pass Yield is measured for the gridcasting department by deriving a percentage from the ratio of "Good Product" (lead grids entered on the department's production report) minus "External Scrap" (defective grids identified on M90 reports in subsequent processes) divided by the "Counter

number" (the reading of the counter that is attached to the gridcasting machine and mechanically counts each ladle pour).

Yuasa argues that this formula and the definitions of its components leave no room for interpretation by an arbitrator. It asserts that the components of the applicable ratio are determined mechanically, through reference to certain forms and to the gridcasting machine's counter. To interpret the formula in a manner requiring the company to disregard defective pours by the gridcasting machine, Yuasa contends, does violence to the plain language of the formula and effectively rewrites the agreement's terms, altering the bargain struck by the parties.

The Union argues that Yuasa's mechanical interpretation cannot be so absolute because it would defeat the essence of the parties' agreement. Thus, it maintains that when the gridcasting machine malfunctions and for that reason produces defective pours unrelated to employees' performance, the defective pours should not be counted against the employees. Yuasa responds that even though such defective pours could defeat any Gainsharing Plan bonuses, they are not excluded by the terms of the agreement. Counsel for Yuasa conceded at oral argument, however, that if the counter itself were broken and improperly recorded pours, the improperly counted pours could not, consistent with the parties' collective bargaining agreement, be used in computing the FPY. This necessary acknowledgment by counsel -- a reading from a counter that does not function cannot be a reading at all -- is consistent with the arbitrator's conclusion that defective pours resulting from an otherwise malfunctioning machine were not intended by the parties to be included in the First Pass Yield calculation. The broken-machine scenario was not addressed by the collective bargaining agreement and therefore had to be addressed through interpretation.

The arbitrator in this case examined the collective bargaining agreement's formula for calculating the gridcasting department's FPY in light of circumstances that the agreement did not expressly address -- the production of a high percentage of defective grids caused by malfunctioning gridcasting machines. He determined that, in these circumstances, the parties intended the formula to reflect the productivity of the workers in the department, not the failure of the machine. Informed by the stated objective of the Gainsharing Plan to "provide the employees with the opportunity to earn additional monies for achieving specified levels of performance," the arbitrator found that the parties' choice of the term "Excess Scrap," defined as "product identified on M90 reports by operators in subsequent processes" (emphasis added), conveyed an intent not to include those grids thrown back into the lead melting pot during the gridcasting process because the machine was defective. Likewise, he determined that the parties intended the term "Counter number," defined with reference to the machine counter, to reflect machine-defect-free pours, a number that would be recorded by the machine's counter if the machine were not malfunctioning. Thus, the arbitrator did not ignore the plain language of the collective bargaining agreement. Rather, he construed it to apply to unaddressed circumstances in a manner that was consistent with the parties' intent as manifested in the agreement itself. See Restatement (Second) of Contracts § 202(1) (1981) ("Words . . . are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight"); see also id. § 202(5) ("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade").

While the proper resolution of this scope-of-arbitration issue is not entirely free from doubt, we must resolve such doubt in favor of arbitration. See Moses H.

Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). When we do so, we conclude that the arbitrator was authorized to construe the FPY formula for circumstances not addressed in the agreement and that his interpretation of the formula drew its essence from the agreement. See Misco, 484 U.S. at 38. Thus, whether or not we agree with the arbitrator's decision on the merits, we believe that the arbitrator was authorized to construe the formula to measure employee production quality by machine-defect-free ladle pours rather than by a number mechanically rendered by a defective machine.

Because we have determined that the arbitrator's award was within the scope of the grievance presented by the parties for his resolution and that the award drew its essence from the parties' collective bargaining agreement, the portion of the district court's order vacating the arbitrator's award is vacated and the case is remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

FILED
NOV. 24, 1999

LARRY W. PROPES, CLERK
FLORENCE, S.C.

ENTERED
11-24-99

Yuasa, Inc.

Plantiff,

v.

International Union of
Electronic, Electrical,
Salaried, Machine and
Furniture Workers, ALF-CIO,
and its Local 175,

Defendants.

C.A. No. 4-99-2003-22

ORDER

Plaintiff, a manufacturer of commercial batteries at a plant in Sumter, South Carolina, brings this action pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 *et seq.*, seeking judicial review of a May 14, 1999, arbitral award. Plaintiff filed its June 22, 1999, "Motion to Vacate Part of an Arbitration Award" asking the

court to both affirm and vacate different portions of the award. Defendants filed their opposition to Plaintiff's motion on July 13, 1999. One month later, on August 13, 1999, Defendants also moved for summary judgment on their counterclaim seeking enforcement in full of the May 14, 1999, arbitral award. Because the parties' motions seek the ultimate relief demanded in their pleadings, the court construes the two motions as cross-motions for summary judgment, Rule 56, FRCP.

The court has studied the complete record in this matter, including the pleadings, answers to court's interrogatories, and the memoranda and all accompanying exhibits. For the reasons given below, the court concludes that Plaintiff's Motion to Vacate Part of an Arbitration Award should be GRANTED and Defendant's Motion for Summary Judgment should be DENIED. The court finds that the arbitrator exceeded his authority under the collective bargaining agreement (CBA) by rewriting essential terms of the agreement. Moreover, his award failed to draw its essence from the CBA. The court is aware of the deferential standard of review normally accorded arbitral awards, is loathe to upset such an award. Nevertheless, the court is compelled to vacate the award where, as here, the arbitrator has not "stayed within the areas marked out for his consideration." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Here the arbitrator's transgressions went beyond the stipulated issues submitted to him and proceeded to the point of rendering an award that does violence to the clear language of the CBA. Thus, this court must vacate the offending portion of his award.

I. FACTUAL BACKGROUND

The material facts of this case are relatively undisputed.[1] After Plaintiff's employees voted to be represented by Defendant International and Local unions (collectively "the union"), Plaintiff and Defendants negotiated their first CBA, with effective dates of April 12, 1998, to April 15, 2001. The company was concerned because it had lost a fair volume of business because of inferior product quality. Some discussion regarding plant shut down ensued. At that time the plant has in place an incentive pay plan that was figured on a piece-work basis. The company identified this plan as part of the problem contributing to inferior quality because employees were rewarded simply based on the total number of units produced irrespective of quality. To keep the plant open, the company wanted to eliminate the piece-work plan and replace it with another incentive plan that considered quality control.

The company had the following goals in its negotiations with the union: to reduce the base rate of pay for employees, to adopt an incentive pay scheme with plantwide "Gainsharing" that was to 20% of total income, and to promote job security for the workers. The union wished to preserve jobs and avoid economic hardship. Using experienced labor negotiators on both sides, the company and the union signed a collective bargaining agreement (CBA) in April of 1998.

As signatory to the CBA, Plaintiff is an "employer" under the National Labor Relations Act (NLRA), 29 U.S.C. § 152(7). Defendant International Union (IUE) ("the union"), an unincorporated association, is a labor organization under the NLRA. IUE has a local branch, Defendant Local #175, in Sumter, South Carolina. IUE is

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[1] Several of the background facts recited here are drawn from the May 14, 1998, arbitral decision and have not been challenged by either party.

the bargaining representative for numerous employees at Plaintiff's Sumter facility.

As noted above, the CBA entered into by Plaintiff and IUE spans the period of April 12, 1998, to April 15, 2001. Aff. of Thresher, Att. B, filed 6/22/99. During negotiations, however, the union had strongly resisted efforts to commit to the Gainsharing Plan for the three-year contract term. The union was uncertain how Gainsharing would work in operation. Accordingly, it negotiated an agreement that the Gainsharing Plan set forth in the initial CBA would apply for one-year only, and that the parties would be free to reevaluate and negotiate another formula at the end of the first year.

The CBA contains a grievance procedure, which requires:

> In order to avoid misunderstanding, the written grievance must cite the specific clause of the Agreement which is claimed to be violated and the remedy which is being sought. Violations of other contract provisions cannot be alleged after the grievance is submitted.

Id. at 14. Under the CBA, the arbitrator is to interpret the contract and to consider "the particular case presented, as specified in the written grievance," *id.* at 16. The arbitrator's power is sharply circumscribed by the following provision:

> He shall have no authority to add to or subtract from or modify any of the terms of the Agreement or any Agreements made supplementary hereto.

Id.

Undoubtedly the most technical aspect of the CBA is the formula for the "Gainsharing Program," an incentive

wage plan. Aff. of D. Thresher, Att. C., filed 6/22/99. The Gainsharing Program is designed to provide employees with an opportunity to earn additional monies for achieving specified levels of performance, particularly verifiable quality improvements. *Id.* at 1. It makes the incentive pay of employees interdependent in nature in order to maximize overall plant productivity. This is in contrast to the historic individual piece-work basis, under which each department was independent in nature. The Gainsharing Program utilizes four distinct performance criteria, including quality, on time delivery, health and productivity.

The primary measurement of quality is a technical ratio known as "First Pass Yield (FPY)," a measurement that is calculated for each month for the company's eight different production departments. To a large extent, FPY indexes will determine if incentive pay is earned.

The CBA expressly establishes the formula by which FPY is calculated for each of the eight production departments. For example, the FPY for the Grid Casting Department is calculated as: FPY = (Good Product – External Scrap)/Counter Number. The CBA defines the preceding numerator as "[t]he Good Product [that] comes from product that is counted by the operator and entered on the production report. External Scrap is product identified on M90 reports by operators in subsequent processes." It further defines the denominator as the number of ladle pours showing on the Counter machine. As the CBA describes it, "[t]he Counter is attached to the grid casting machine and counts each ladle pour as it is made." The company measures its units of production in "grids" or molded lead forms.[2]

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[2] Plant Manager Burkhart described a grid as, "we receive raw lead and – we call them pigs, a pig if it weighs sixty-five pounds, it's a hog if weighs two thousand, but we take this lead and we throw it into a lead pot – and it melts the lead, and then that lead is then gone through a casting machine to make a grid." Aff. of D. Thresher, Att. B, Arbitration Award, dated May 14, 1999, at 11.

As a part of the new CBA, employees accepted lower wages in exchange for an opportunity to receive increased incentive pay under the Gainsharing Program. For example, prior to the adoption of Gainsharing, plant employees had earned an average of $11.54 per hour whereas after adoption of the Program their average earnings were $9.71 per hour, plus whatever incentive pay they earned under the Plan. During negotiations the company had told the union that the employees would have an opportunity to exceed their former pay under a Gainsharing Plan.

Article XXVII of the CBA contains a merger clause describing the boundaries of the agreement. Section 1 states:

> The Company and the Union agree that during the negotiations which resulted in this Agreement, each party had the unlimited right and opportunity to formulate demands and proposals with respect to any and all subjects or matters not excluded by law from the collective bargaining process. The parties further agree that all decisions and covenants reached by the parties during the collective bargaining negotiations are fully set forth in this Agreement and that the items herein set forth contain the complete agreement between the parties for the term of this Agreement. Therefore, for the duration of this Agreement, each of the parties hereby voluntarily and unconditionally waives the right to bargain collectively with respect to any matter referred to or covered in this Agreement, or any matter not specifically raised during the negotiation or covered in this Agreement, known or unknown, but which could have been raised by either party.

Similarly, Section 2 of Article XXVII provides that:

> This Agreement contains all agreements reached between the parties with respect to the matters deemed by them to be applicable to the bargaining unit. Any amendment, addition, deletion, change, wavier, or modification of this Agreement shall only be discussed by mutual agreement of both parties, and any agreement reached must be in writing and signed by both parties to be effective.

The preceding two sections thus limit any party's ability to enforce unwritten oral promises.

II. PROCEDURAL HISTORY

Just two months into the term of the CBA, the Local union filed grievance number 1-7-98 on June 22, 1998.[3] Aff. of D. Thresher, Att. E. This grievance challenged the company's method of calculating FPY plant-wide, something the CBA did not establish. Under the Plan the company was calculating plant-wide FPY by multiplying together the eight individual departmental FPY percentages. However, the union thought that plant-wide FPY should be calculated by averaging the eight different departmental FPYs.

The grievance alleged a violation of Article XXIV, Section 1 of the CBA. This CBA section provides as follows:

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[3] The union had filed another grievance, 1-5-98, challenging disclosure of documents surrounding the Gainsharing Plan and implementation of the phase-in provisions of the CBA. This grievance was sustained in full by Arbitrator Robert W. Foster by written award of May 11, 1999. This matter is not part of the current dispute before the court.

> The Company shall discontinue the current incentive plan and implement a Gainsharing Plan which will provide the opportunity to earn more money than the incentive plan. The Gainsharing Plan will be implemented on a one (1) year trial basis. Either party may request, between sixty (60) and thirty (30) days prior to the end of the trial year, to meet and begin negotiations over revisions in the Gainsharing Plan. In the event that neither party requests to meet and begin bargaining, the Gainsharing Plan shall continue as is throughout the remainder of the Agreement.

The union described the "Nature of Grievance" as a "[v]iolation of the intent of language to determine the percentages for 'First pass Yield.'" They requested the following remedy:

> Determine 'First pass Yield' by using average of each Department added and divided by the number of Departments. (Dept. as identified in Attachment C.)

Aff. of D. Thresher, Att. E. The union pursued its grievance to arbitration under the terms of the CBA. The parties jointly selected Robert J. Ables as arbitrator.

Following a hearing on February 24-25, 1999, Arbitrator Ables issues a twenty-page opinion. Aff. of D. Thresher, Att. A. Because of the multiple issues addressed in the award, it is difficult to classify the arbitral award as finding in favor of either the company or the union. The decision appears to favor both sides in different respects.

The award first addressed how to calculate plant-wide FPY, the issue presented to the arbitrator. After hearing substantial testimony regarding the CBA

negotiations, the arbitrator concluded that multiplication of FPYs for each department was the historic and correct method of calculating plant-wide FPY. *Id.* at 17. Thus, the arbitrator affirmed the company's method for deriving plant-wide FPY.

The award did not, however, confine itself to the singular question of plant-wide FPY calculation. Rather the arbitrator went further and considered the ultimate fairness of the Gainsharing Program in operation. He specifically noted that during almost one year of operation under the Program, employees had received incentive pay in only three months and that they were making about $2.00 less per hour than under the former plan. The arbitrator found that despite overall improvements in product quality plant-wide, and the company's statements that employees could earn more money under this Plan, reality had proved otherwise. The arbitrator further opined that,

> [r]eason intercepts finding in favor of the employer overall because how it determines scrap in the first stage of production – "grid casting" – the most influential operation affecting department and therefore plant FPY – is invalid. It is invalid because almost all of scrap attributed to such first stage of production which the employer counts against the department's efficiency cannot be corrected by the operator. Quality of work being the company imperative and incentive pay depending on quality work and the operator not being able to influence the quality of the product first coming to his assignment, it cannot be accepted that FPY, as determined by the company in that department, is within contract terms, negotiating history, facts, or reason.

Id. at 6-7. In other words, Arbitrator Ables attributed the failure to earn incentive pay under Gainsharing to an anomaly in the method of calculating FPY for the company's first production department, Grid Casting. He did not think it was reasonable to count as Grid Casting Department "scrap" items over which the grid casting personnel had no control. The arbitrator credited the testimony of union witnesses Bunker that all of the causes for bad grids in the grid casting operations arose from machine failures or defects, and not operator errors. *Id.* at 12. This witness indicated that an incentive pay formula under which an operator's productivity could be curtailed by forces beyond his control was inconsistent with the policy underlying a Gainsharing Program.

Accordingly, Arbitrator Ables then ordered that the express CBA formula set forth for calculating FPY in the Grid Casting Department be modified to "back out" from the external scrap figure items arising from machine malfunction or defective pours. In other words, in calculating the Grid Casting FPY formula as "Good Product – External Scrap/Counter" henceforth, the "scrap" number would be reduced in an effort to remove the defects not within the operator's control.

At the hearing Arbitrator Ables had received testimony of union witnesses about the negotiations. He credited statements that the employer had given the union oral assurances during negotiations that the "external scrap" calculation would be reduced in such a fashion. It is undisputed, however, that such a promise was never reduced to writing and incorporated into the CBA.

Having thus isolated what he perceived to be the "Achilles heel" of the Gainsharing Plan and ordering a refinement to make the Plan more equitable, the arbitrator concluded that the company could continue using its multiplier method of calculating plant-wide FPY.

The union sought backpay for the alleged FPY formula violation. Even though the arbitrator essentially

sustained the company's multiplication formula, he opined that back pay would be appropriate. The arbitrator confessed to difficulty in calculating the amount.[4] He ordered that the damages portion of the grievance be bifurcated and that the parties should negotiate and attempt to settle the backpay question. Shortly after receiving its copy of the arbitral award, the company initiated this action on June 22, 1999, seeking review of the May 14, 1999, arbitral award.

III. THE PLEADINGS

Plaintiff complains that the arbitrator improperly revised the expressly-stated formula for calculating "external scrap" in Attachment C to the CBA. Plaintiff insists that "[a]ll defective product coming into a department from another department, regardless of the cause of the defect, is identified on the M90 reports." Complaint at ¶34. Further, "[a]ny subtraction from the M90 report number of defective product caused by machinery malfunction or where the defect is not caused by the operator, as the Arbitrator ordered (assuming again that it is possible to identify such defective product), would be a modification of the express formula set forth in 'Attachment C.'" *Id.* at ¶35.

Plaintiff's First Cause of Action alleges that the arbitrator exceeded his authority under the CBA by addressing issues not raised in the written grievance and that he improperly modified the formula for determining Grid Casting FPY as set forth in Attachment C to the CBA. Plaintiff's Second Cause of Action repeats the preceding allegations but charges that the arbitrator's award fails to draw its essence from the CBA. Thus Plaintiff asks the court

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[4] It is easy to understand the extent of this problem as the arbitrator had not solicited the parties' opinions on the refinement to the Grid Casting FPY calculation. At no time during the submission of the case to the arbitrator, which included post-hearing briefing, did the arbitrator ever intimate that he would refine the FPY calculation in such a manner.

to strike the offending portion of the award that modifies the formula for calculating FPY and to vacate any order compelling backpay in some indeterminate amount. At the same time, Plaintiff asks the court to affirm the arbitrator's decision that multiplication of departmental FPYs is the proper method to determine plant-wide FPY.

The union filed its Answer and Counterclaim on July 13, 1999. It admits filing grievance number 1-7-98, but denies the remaining allegations. Its counterclaim asserts that the grievance expressly charged Plaintiff with "[v]iolation of the intent of language to determine the percentages for 'First Pass Yield," Answer and Counterclaim at 8. Thus, the union insists the issue presented to Arbitrator Ables was broader than that framed by the company. They contend the issue could more properly be described as, "[w]hether the Company is violating Article XXIV of the collective bargaining agreement by improperly calculating plant-wide First Pass Yield, and, if so, what should the remedy be?" Answer and Counterclaim at 9. The union insists that the arbitrator correctly concluded that the company's application of the Gainsharing Plan in the Grid Casting Department "is at odds with the CBA and the intent underlying the parties' adoption of the Gainsharing Plan (i.e. to reward employees for improvements in their quality of performance)." *Id.* The union further argues that the award was "responsive to the issues raised by the parties in Grievance No. 1-7-98 and within his authority pursuant to the terms of the CBA." *Id.* at 10. Accordingly, Defendants ask the court to confirm the award in full.

IV. JUDICIAL REVIEW OF ARBITRAL AWARD

A. Parties' Arguments

Plaintiff contends that the scope of the matter entrusted to the arbitrator was circumscribed by the CBA and the written grievance. Plaintiff argues that the written

grievance, set forth as Att. E to the affidavit of D. Thresher, Plaintiff's Plant Manager, did not request that the formula for calculating FPY for any department be modified. At the hearing, Defendant International Union's Representative, E. Young, testified he had described the specific grievance to the company as, "that you would add up the departments and divide by the number of departments . . ." (Aff. of D. Thresher, Att. D at 398-99. Plaintiff argues that the preceding testimony illustrates that the matter stipulated for submission was limited to the plant-wide FPY formula question. Further, Plaintiff points out that even after the hearing, neither party requested a modification to the FPY formula in its post-hearing brief. Plaintiff explains that neither party had requested relief in the form delivered and that the arbitrator had not consulted the parties over his authority to modify the Plan in any fashion.

Plaintiff argues that the parties entered into a CBA which established a specific and concrete formula for calculating departmental FPYs. Plaintiff insists that the arbitrator's *sua sponte* decision to order wholesale revisions to the formula for calculating FPY for the Grid Casting Department ignored several limitations on his authority under the CBA. In Plaintiff's view, the component factors in the FPY formula of "Counter number," "Good Product" and "External Scrap" are all definite and ascertainable numbers representing terms with which the parties were familiar and in agreement at the time of entering into the CBA. Thus, Plaintiff insists the arbitrator had no license to modify the contractually-agreed upon formula to suit his own concept of industrial justice. In sum, Plaintiff contends the award violates Article XIV § 4 of the CBA ("[t]he arbitrator may only interpret the contract and apply it to the particular case presented, as specified in the written grievance. He shall have no authority to add to or subtract from or modify any of

the terms of this Agreement or any agreements made supplementary hereto).[5]

Plaintiff also contends that the arbitrator's proffered reason for revising the FPY formula is unconvincing. The award reasoned that the union "cannot responsibly have accepted a new contract with substantial pay cuts under an untried incentive pay plan if it know [sic] or had good reason to believe that the company's plan to determine FPY under the new interdependent system . . . would almost certainly assure sharply reduced or non-existent pay incentives." May 14, 1999, award, Aff. of D. Thresher, Att. A, at 14. Plaintiff contends that uncertainties of the Gainsharing Plan in operation were something accepted by both parties to the CBA. In other words, both parties voluntarily and intelligently assumed the risks of Gainsharing in operation. Plaintiff insists that the union received all that it was promised under the CBA. Moreover, the fact that the union knew that the outcome under Gainsharing was speculative is evidenced by the fact that it refused to commit to any Gainsharing Plan formula for longer than one year. Plaintiff urges that just because the Plan did not work out in operation as favorably as it might have for the employees does not empower the arbitrator to rewrite the script to "balance out" perceived inequities.

Plaintiff points to numerous Fourth Circuit cases vacating arbitral awards where the arbitrator ignored clear and unambiguous contract language in order "to dispense his own brand of industrial justice," *Champion Int'l Corp. v. United Paper Workers Int'l Union*, 168 F.3d 725, 728-29 (4th Cir. 1999). Specifically, Plaintiff chiefly relies on

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[5] Plaintiff also contends the award implicitly violates Art. XIV, § 6. This provision requires that "[o]nly one grievance shall be scheduled for the same arbitration hearing unless there is mutual agreement to the contrary by the parties." Plaintiff asserts that the arbitrator's analysis should have been confined to the plant-wide FPY formula question, as referenced in the written grievance.

Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606, 608 (4th Cir. 1996), in which the Fourth Circuit vacated an award where the arbitrator modified a positive-drug test grievant's discipline from discharge to a suspension. There, the employer's drug testing policy mandated discharge for any employee with positive drug-test results. Swayed by the employee's work history, the arbitrator concluded the employer's policy was unnecessarily harsh. The arbitrator in *Mountaineer Gas* refused to find just cause for termination.

Plaintiff contends Arbitrator Able's transgressions were similar to those at issue in *Mountaineer* and can be condemned using the language of the Fourth Circuit in the *Mountaineer* decision:

> The arbitrator's role clearly prohibited him from amending, adding to, or subtracting from the [collective bargaining agreement]. Therefore, by converting permanent discharge into a disciplinary suspension, the arbitrator did not do his job. Instead, the arbitrator blatantly ignored the unambiguous language of the Drug Policy and fashioned a modified penalty that appealed to his own notions of right and wrong . . . by fashioning an entirely new remedy and infusing his personal feelings and sense of fairness into the award, the arbitrator created an award that failed to draw its essence from the [agreement] . . ."

76 F.3d at 610.

On the other hand, Defendants insist the court should not disturb an award of an experienced labor arbitrator jointly selected by the parties. They phrase the issue for determination in the award as, "whether the employer . . .

miscalculat[ed] under an incentive plan, how to credit performance -- mostly as to quality of work of employees -- in eight departments in the plant which produces commercial batteries," as stated in the opening paragraph of the award. They point to evidence that during negotiations company officials orally assured the union it would allow Grid Casting operators to shut down equipment if defects occurred from machine malfunction. Thus, they contend that the adjustment to the FPY formula for the Grid Casting Department is necessary in order to effectuate such promises underlying the CBA, which admittedly are not reduced to writing. They point out that under Plaintiff's formula for calculating Grid Casting FPY, FPY rarely exceeds 85%, which is the basic minimum 85% plant-wide FPY required for any payment under the Gainsharing Plan. Thus, even if the seven sequential departments operating behind Grid Casting score a near perfect 99% FPY, the resultant percentage ratio of plant-wide FPY (using a multiplication formula) would fall short of the 85% plant-wide FPY. They further argue that the arbitrator was justified in concluding that Plaintiff's application of FPY formula is at odds with its commitment that all employees would have an opportunity to earn more money than under the former piece-work basis formula.[6]

Defendants urge that this court should entertain only the narrowest judicial review of this arbitral award, citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). They further point to the Fourth Circuit's admonition in *Richmond, Fredericksburg & Potomac R.R. v. Transportation Comm. Int'l Union*, 973 F.2d 267, 278 (4th Cir. 1992), that, "permitting judicial second-guessing of arbitral awards would transform a binding process into a purely advisory one, and ultimately impair the value of

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[6] In fact, Defendants contend the employees are earning 16% less under Gainsharing and that Plaintiff is retaining $100,000 a month more as a result of reduced wages, despite the fact that all departments had demonstrated improvements in quality.

arbitration for labor and management alike." Defendants attack Plaintiff's narrow construction of the issue presented to the arbitrator.[7] Defendants insist the arbitrator merely construed the CBA in the context of the parties' agreement as a whole. Defendants dispute that the formula for calculating Grid Casting FPY was concrete, calling it "cryptic" and insisting that all the arbitrator did was construe an ambiguous formula in accordance with the parties' expectations and negotiations. Finally, they reject any contention that Art. XIV, §4 limits the arbitrator's authority to fashion relief upon violation of the CBA. They insist that the scope of the grievance was adequately described in their written grievance as "violation of the intent of language to determine the percentages for 'First pass Yield'" and empowered the arbitrator to act accordingly.

B. Legal Analysis

Federal courts have the authority to review the decisions of labor arbitrators pursuant to § 301 of the LMRA, 29 U.S.C. § 185, but this review is severely limited, and is "among the narrowest known to the law." *District 17, United Mine Workers of America v. Island Creek Coal Co.*, 179 F.3d 133, 136 (4th Cir. 1999) quoting *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978). Thus, so far as the arbitrator's decision concerns construction of the labor contract, the courts have no business overruling him because their interpretation of the contact is different from his. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). In *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 36 (1987), the Court established:

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[7] Defendants state that "the Company contends that the Arbitrator was bound to view the formula in isolation, divorced from every other part of the Agreement, and adopt a literal reading of the language no matter how at odds with clear manifestations of the parties' underlying intent." Defs' Memo. in Support, filed 8/13/99 at 16.

> The arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Nevertheless, "there are limits to what arbitrators may do." *District 17*, 179 F.3d at 137. Judicial deference to arbitration does not grant carte blanche approval to any decision that an arbitrator might make. Courts retain the obligation to insure that a labor arbitrator has acted within the contractually-drawn boundaries of his or her authority. *Champion Int'l Corp. v. United Paperworkers Int'l Union,* 168 F.3d 725 (4th Cir. 1999). An arbitrator can bind the parties only on issues that they have agreed to submit, and whether the arbitrator has exceeded those bounds is a proper issue for judicial review. *International Ass'n of Machinists, District 776 v. Texas Steel Co.*, 639 F.2d 279, 283 (5th Cir. 1981). The question whether a labor arbitrator exceeded the scope of his authority is a question of law. *Island Creek Coal Co. v. District 28, United Mine Workers of America,* 29 F.3d 126 (4th Cir. 1994). A court may vacate a labor arbitration award if the arbitrator exceeds the scope of the submission by ruling on issues not presented to him by the parties. *Textile Workers Union of America, Local Union No. 1386 v. American Thread Co.*, 291 F.2d 894, 900-01 (4th Cir. 1961) (arbitrator went beyond issues submitted to him by considering appropriateness of discipline where grievance concerned whether employer violated terms of agreement). *See also Pennwalt v. Local Lodge,* 638 F. Supp. 313 (W.D. Ky. 1986), *aff'd*, 822 F.2d 59 (arbitrator exceeded scope stipulated issues). Thus, although the law recognizes that

judicial review of an arbitral decision is deferential on the merits, it also recognizes that the arbitrator's jurisdiction is shaped by the underlying CBA. *E.I. DuPont v. Local,* 803 F. Supp. 1223 (S.D. Tex. 1991) *aff'd*, 968 F.2d 456 (5th Cir. 1992).

An arbitral award also may be overturned if it "violates well-settled and prevailing public policy, fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's own notions of right and wrong." *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606 (4th Cir. 1996). Here, Plaintiff challenges the award as exceeding the arbitrator's authority and failing to draw its essence from the CBA.

Although the court's review of Fourth Circuit precedent fails to yield any case raising factually identical circumstances, several cases are illustrative of the situations that compel a court to vacate an arbitral award. For example, in *Champion Int'l Corp.*, 168 F.3d 725, the Fourth Circuit held that a labor arbitrator's award of stabilization bonuses failed to draw its essence from the CBA. There the arbitrator had awarded stabilization bonuses to non-qualifying employees under the employer's severance plan, a decision without support in either the severance plan or CBA. Drawing on its earlier statements in *Mountaineer Gas*, 76 F.3d at 608, recognizing that an award that "ignore[s] the plain language" of a CBA cannot stand, the court in *Champion* held the arbitrator had abdicated his basic duty to apply the CBA provisions. The court found that because the award failed to construe pertinent terms of the underlying CBA it also "failed to draw its essence" from the CBA.

Similarly, in striking the diminished discipline award in *Mountaineer Gas Co.*, the Fourth Circuit outlined a three-part test under which to review arbitral awards. The court must consider: (1) the arbitrator's role as defined by the CBA; (2) whether the award ignored the plain language of the CBA; and (3) whether the arbitrator's discretion in formulating the award comported with the essence of the

CBA's proscribed limits. 76 F.3d at 608. There, the arbitrator's decision to lessen the punishment meted out to the employee -- directly in contravention of the employer's policy -- ignored the plain language of the agreement. The court condemned the arbitrator's decision "infusing his personal feelings and sense of fairness into the award" and held that it failed to draw its essence from the CBA, which reserved the question of appropriate discipline to the employer alone. *Id.* at 610.[8]

In another case, *Island Creek Coal Co. v. District 28, United Mine Workers of America*, 29 F.3d 126 (4th Cir. 1994), a labor arbitrator awarded a $1,000 "enforcement penalty" to a union based on the fact that the employer had been subject to previous cease and desist orders prohibiting the allegedly offending practice. The pertinent CBA had no provision authorizing punitive damages. Doubtless frustrated over lack of compliance with the previous cease and desist orders, the arbitrator reasoned:

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[8] The decision in *Mountaineer Gas* vacating the award may be contrasted with the court's decision in *Eastern Associated Coal Co. v. United Mine Workers of America, District 17*, 188 F.3d 501, 1999 WL 635632 (4th Cir. 1999), in which the court affirmed the district court's refusal to vacate the award. There the Wage Agreement required just cause for a discharge. After an employee was discharged based on a positive test result, he grieved the termination. The arbitrator ordered the employee returned to work after a suspension without pay. The district court affirmed the arbitrator's decision, reasoning that because neither the Wage Agreement nor the drug abuse policy expressly mandated termination as the punishment for a positive result, the arbitrator could rationally have found a lack of just cause. The Fourth Circuit affirmed on the reasoning of the district court. Thus, viewed together the decisions in *Mountaineer Gas* and *Eastern Associated Coal Co.* illustrate how a CBA marks the boundaries of an arbitrator's authority. In the present case, the court concludes that Arbitrator Ables' actions rewriting the Grid Casting FPY were akin to those of the arbitrator in *Mountaineer Gas* who ignored the mandatory termination policy under the agreement.

> To those who live by [the contract], there must be no wrong without a remedy. Frustrations have led to Cease and Desist orders. Such an order means nothing unless it can be enforced. The contract contemplates effective enforcement.

29 F.3d at 128. Thus, the arbitrator "created" an enforcement penalty to induce future compliance with the terms of the agreement. On appeal, the Fourth Circuit affirmed the district court's decision vacating the award. The court condemned the arbitrator's creative attempts to rewrite provisions of the contract as failing to draw their essence from the contract.

Arbitrator Able's attempts to balance the perceived inequities of the Gainsharing Plan through the May 14, 1999 arbitral award were equally misplaced. The court has reviewed the terms and conditions of the submission to Arbitrator Able, as well as the collective bargaining agreement and all related exhibits. The court agrees with Plaintiff that the arbitral award here is vulnerable on multiple grounds.

Applying the three-part *Mountaineer* framework, Article XIV expressly establishes that the arbitrator is employed merely to interpret and apply the agreement to the grievance before him. He is prohibited from adding to, subtracting or modifying in any manner the terms of the CBA. The second consideration is whether the award violated the plain language of the CBA. In this instance, the court finds the arbitral award violated numerous provisions of the CBA. It violated the express formula for determining FPY for the Grid Casting Department, as specified in Attachment C to the CBA, by reducing the "excess scrap" figure to account for certain machine-caused scrap. The arbitrator's reconfiguration and contract revision, laudable as it must have appeared to him from an overall "fairness" perspective, was clearly outside the contemplation and

agreement of the parties at the time of contracting. This is evidenced by the fact that the agreement expressly prohibited the arbitrator from second-guessing the judgment of the contracting parties and rendering his own brand of "industrial justice."

In the court's opinion, Arbitrator Ables misapprehended his task as arbitrator. The fact that he viewed his position as some sort of super-Solomon like-arbiter is perhaps revealed by his reflection that:

> [the union] cannot responsibly have accepted a new contract with substantial pay cuts under an untried incentive pay plan if it know [sic] or had good reason to believe that the company's plan to determine FPY under the new interdependent system, with deductions in FPY for findings of defects by quality assurance personnel or because of "Related Measures" (Attachment C) would almost certainly assure sharply reduced or non-existent pay incentives.

The arbitrator was unwilling to countenance that union officials had simply made a "bad deal" or exercised poor choice of judgment in approving the Gainsharing Plan.[9] He was unwilling to leave the parties in the position in which they had placed themselves after protracted negotiations by experienced personnel. He viewed his role as the ultimate balancer of unfairness or overreaching. Such an

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[9] The court is *not* opining that the union, indeed, made a "bad deal." No one but the parties privy to the contract negotiations knows the constraints and alternatives open to each party at the time of contracting. Thus, it would be foolhardy for this court to attempt to appraise the wisdom of the union's decision. All the court can really say is that the parties did not bargain for this court's, or Arbitrator Ables', personal opinion of the wisdom of their decision. Rather, the parties bargained for a mechanism to enforce the contractual guarantees they had made.

interpretation of his role clearly exceeded the boundaries of the role entrusted to him in the CBA.

The award also violated the two merger provisions of the CBA, set forth in Article XXVII. It is apparent to the court that the arbitrator's motivation to revise the FPY Grid Casting formula lay in the perceived inequity in allowing the company to ignore its oral promises during negotiations that it would back out machine-caused scrap from the FPY formula. Arbitrator Ables felt empowered to make the company responsible for those statements. However, in doing so and in revising the formula to incorporate these earlier oral promises, Arbitrator Ables violated the merger provisions of the CBA. The risk that oral promises might be made during negotiations and might be broken thereafter if not reduced to writing was a risk clearly within the contemplation of the parties at the time of contracting, as evidenced by the merger clauses. The May 14, 1999, arbitral award essentially excised the merger clauses from the CBA.

Arbitrator Ables' decision awarding backpay is wholly inconsistent with his decision approving the employer's method of figuring plant-wide FPY. Furthermore, Plaintiff was given no notice that such a remedy was being contemplated. It is hornbook law that the relief awarded cannot extend beyond that envisaged under the CBA. For example, in *Westinghouse Elec. Corp. v. International Brotherhood of Elec. Workers,* 561 F.2d 521, 525 (4th Cir. 1977), an arbitrator awarded three days' backpay. The Fourth Circuit vacated the award, reasoning that "though nominally compensatory, the award was actually punitive. Because no provision of the contract warranted the punishment, the arbitrator exceeded his jurisdiction." To the extent that the arbitral award authorized back pay relief in the interest of fairness, even when no violation of the CBA had been proved, the award was punitive and without foundation in the CBA.

Contrary to the parties' arguments, the focus of the court is not primarily on the stipulated issues before the

arbitrator. That is because even if it is assumed that the scope of the issues presented in the grievance was the broader grievance framed by the union, *i.e.*, challenging the fairness of the FPY formula overall, the arbitral award still fails. Even where an arbitrator is considering matters properly entrusted to him, he must still do so within the parameters established by the CBA. "One way to test the validity of an arbitration award on the basis of whether it reflects the arbitrator's own brand of industrial justice is to ask whether the award ignored the plain language of the collective bargaining agreement." *Champion Int'l Corp.*, 168 F.3d at 728. Because the court finds that the May 14, 1999, arbitral award ignores CBA provisions establishing an express formula for Grid Casting Department FPY and prohibiting oral modifications to the CBA, the court must conclude that the arbitrator exceeded his authority under the CBA and that his award failed to draw its essence from the CBA.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Vacate Part of an Arbitration Award, filed June 22, 1999, is GRANTED IN FULL. The court affirms the May 14, 1999, arbitral award only insofar as it finds that plant-wide FPY should be calculated by multiplication of individual FPYs; all other portions of the May 14, 1999, arbitral award are VACATED.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment, filed August 13, 1999, is DENIED. The Clerk of Court shall enter judgment in favor of Plaintiff.

IT IS SO ORDERED.

\s\ _____
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Florence, South Carolina
November 23, 1999

Before
ROBERT J. ABLES
Arbitrator

YUASA, Incorporated Sumter, South Carolina Employer And International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers (I.U.E.) AFL-CIO, Local #175	Federal Mediation and Arbitrator Service Case No. 98-14043 Dispute Concerning Calculating First. Past Yield in Garnishing Plan

Appearing For The Union:	Steven M. Kolslow, Esq. I.U.E., Washington, D.C.
Witnesses Called By The Union:	C. Burkhart, Plant Manager
	Vincent Gailliard, Chief Steward
	Larry Brown, Secretary/Treasurer
	O'Dell Bradley, Former Chief Steward
	Elmer Moyer, I.U.E. Representative

	David M. Bunker, Grid Caster
	Edward E. Young, I.U.E. Representative
Also Present:	Cathy Moody, President Local 175
	Gladys R. Jones Recording Secretary
	Sharon F. Brown, Vice President Local 175
	Charles J. Van Derken Secretary/Treasurer I.U.E., District 1
	Ricardo Robinson Grid Caster
Appearing For The Company:	Stephen F. Fisher, Esq. Greenville, South Carolina
	J. Steve Warren, Esq. Greenville, South Carolina
Witnesses Called By The Company:	C. Burkhart, Director Mfg. Support; Former Plant Manager
	Michael Moses, Quality Manager

	Cathy Moody, President Local 175
	Allen Clemmons, Grid Caster
	Doyle Tresher, Plant Manager
	J. Steve Warren, Chief Negotiator for Company
Also Present:	Allen W. Schintzius Human Resources Manager
Proceedings:	Class Action Grievance: January 7, 1998 Arbitration hearings: February 24 and 25, 1999; Sumter, South Carolina. Witnesses at arbitration hearing sworn; not sequestered. Transcripts received by arbitrator: March 11, 1999. Post hearing briefs received by arbitrator: April 7, 1999
Date of Decision:	May 14, 1999

ARBITRATION AWARD

Yuasa, Inc.
Sumter, South Carolina

and

International Union of Electronics, Electrical, Salaried,
Machine and Furniture Workers
(I.U.E.) AFL-CIO, Local #175

Dispute Concerning Calculation of First Pass Yield
in Gainsharing Plan.

OPINION

I. ISSUE

At issue under a collective bargaining agreement and class action grievance by the union, International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers AFL-CIO Local #175, on behalf of about 400 bargaining unit employees, is whether the employer Yuasa Incorporated in Sumter, South Carolina violated that agreement by miscalculating, under an incentive pay plan, how to credit performance – mostly as to quality of work of employees – in eight departments in the plant which produces commercial batteries.

II. FACTS

The incentive plan is known as "Gainsharing".

The yardstick by which to measure the quality of product which moves sequentially through the eight departments is "First Pass Yield" (FPY).

Incentive (Gainsharing) pay over basic pay, in increasing amounts, is due at set levels on a sliding scale determined by FPY results.

First Pass Yield basically is a measure of good product minus bad product (such as scrap or required re-work).

As argued, the union maintains that the FPY for the plant (which is the product of the quality of work in the eight departments) should be determined by averaging the efficiency of each department; the employer maintains such result should be determined by multiplying the result in each department.

Whether or how much incentive pay employees can earn can be dramatically different, depending on which method of calculating FPY is used.

For instance – using realistic experience – if FPY results of each department are averaged and the efficiency in one department is low (say 85 per cent) and each of the other seven departments is 95 per cent, the bottom line for the plant FPY would be 93.75 per cent, thus entitling employees to maximum incentive pay of $250 a month, under the applicable schedule.

If, on the other hand, the multiplication method were employed using the same efficiency results, the plant FPY would be 56.38 per cent for which employees would earn no incentive pay (which starts at 85.0 per cent efficiency, which if attained entitles employees to an incentive payment of $100 a month).

In short, under the average method of calculation, if one department has a low efficiency percentage, incentive pay can be earned but the company's interest in high efficiency percentages for the end – good – product will not be realized. The multiplication method on the other hand holds hostage, perhaps, from earning incentive pay more than 87 per cent of the employees who did high quality work.

III. ARGUMENTS

The parties using experienced and capable attorneys argued their respective positions intensely and extensively.

Union

The union, with the burden of proof, presents the issue as whether the company is violating Article XXIV of the collective bargaining agreement "by improperly calculating plant-wide First Pass Yield" and if so what the remedy should be?

In support of its argument that plant-wide FPY should be determined by averaging department FPYs, the union argues that: in negotiations, plant manager C. Burkhart committed to that method of calculation; union officials did not learn until after the contract was signed that the company was calculating FPY by multiplying experience in each department, a system not specifically agreed to in the contract nor in any other writing; the union could not have agreed on the multiplication system of calculation because the grid casting department, which is most critical in determining plant-wide FPYs could rarely if ever achieve an FPY above 92 per cent which would be required to realize any incentive pay under the Gainsharing Plan, the company undermined effective implementation of the Gainsharing Plan under either the average or multiplication system of calculation, because supervisors instructed employees not to shut down equipment when bad product was evident, despite commitments during negotiations it would authorize such shutdowns; and that the company inappropriately includes as scrap, in the grid casting department, bad pours of lead into grids, or which are due to mechanical failures.

The union also argues that he company's refusal to comply with the union's request for FPY data and calculations justify the arbitrator drawing adverse inferences

abut the good faith of the company in administering agreed terms.

As a remedy for stated violations, the union asks in its post hearing brief (p 19 et. seq.) that 1. the arbitrator order the company to pay employees the difference between the actual earnings since June 15, 1998 (the end of the "red circle" provision) and their average earnings during the last two months that the old pay system was in effect; and 2. continue paying employees on a status – quo ante basis.

Alternately, the union asks that the arbitrator order the company to re-calculate monthly plant-wide FPY by averaging department FPYs and pay employees gainsharing bonuses accordingly.

Company

The company presents the issue to be whether the company violated the collective bargaining agreement by multiplying department First Pass Yield times department FPY, et cetera, instead of averaging department FPY, as the union requests.

The company argues that the grievance should be dismissed because: experienced union negotiators did not ask how to calculate First Pass Yield or propose an alternative plan; in at least one meeting of the parties, a company negotiator specifically told a union negotiator that it would use the multiple system; employees had experience calculating FPY; the Gainsharing Program was silent as to the exact calculation of First Pass Yield because it was a common and well-recognized term in the plant; the only issue before the arbitrator is the union's claim that FPY should be determined by averaging department FPYs; sympathy for the union because of wage cuts and limited incentive pay under the Gainsharing plan is not warranted because experienced union negotiators knew the full dimension of the contract including insistence on safeguards to be added to contract terms on gainsharing; Attachment C

to the contract makes clear that FPY in the grid-casting department is based on ladle pours; and that the average plan of determining department FPY could result in as little as 50 per cent good product for shipment to customers and still entitle employees to incentive pay under applicable schedules, a result which would remove incentive for employees to improve the quality of their work which was the purpose of the Gainsharing plan.

The company not only asks that the grievance be denied, it asks for costs and attorneys' fees because the union's grievance was patently frivolous and was filed in bad faith.

IV. FINDINGS

Each party relies on contract terms, negotiating history, facts and reason to make its case.

The contract is silent on the question whether to use averaging or multiplication in calculating First Pass Yield.

The negotiating history favors the employer's view that multiplication of departmental FPY results was intended.

Reason intercepts finding in favor of the employer overall because how it determines scrap in the first stage of production – "grid casting" – the most influential operation affecting department and therefore plant FPY – is invalid. It is invalid because almost all of scrap attributed to such first stage of production which the employer counts against the department's efficiency cannot be corrected by the operator. Quality of work being the company imperative and incentive pay depending on quality work and the operator not being able to influence the quality of the product first coming to his assignment, it cannot be accepted that FPY, as determined by the company in that department, is within contract terms, negotiating history, facts, or reason.

This is the first collective bargaining agreement of the parties (starting April 3, 1998 after some birth pains).

The company was in economic distress because of loss of business and customer complaints about the quality of product making it possible that the company would shut down the plant if quality of work were not improved.

Before the contract, piece work was the basis for incentive pay.

In early negotiations, company financial objectives were to combine job classifications; replace individual incentive with plant-wide gainsharing; reduce the base pay rate; gainsharing was to be 20 per cent of total income; and to structure gainsharing to promote long term job security at the plant in Sumter, South Carolina. Company Exhibit # 1.

Union objectives were to get a first contract with the least economic pain.

On piece work, previously, as the basis for incentive pay, each party accepted that it was an inefficient plan because bad product counted as much as good product, with employees and supervisors focused unduly on total product rather than its quality.

The Gainsharing Plan designed and presented by the company was revolutionary but not unheard of by union negotiators. Its object was to make the work – and thus incentive pay – of employees in eight different departments interdependent, rather than based on individual piece work.

In explaining the Gainsharing Plan to union negotiators and thus seeking to persuade them to accept that plan, company negotiators emphasized the potential of increased job security and, more directly, more incentive pay as, synergistically, improvement in the First Pass Yield experienced in each department increased chances of greater production which was to be rewarded under specified standards for quality work:

$100 a month at level 85.0% - 87.9%
$150 a month at level 88.0% - 89.9%
$200 a month at level 90.0% - 91.9%
$250 a month at level at or over 92.0%

The "opportunity" (as it was to be written into the contract) for increased incentive pay was to compensate employees for their agreeing to take a pay cut for production under the piece work system of incentive pay.

Basic pay now was to be $9.71 an hour; it had been on average, $10.83 an hour. Incentive pay, now, was to be realized under gainsharing, which could, if maximum incentive were earned, be as much as seven per cent higher than under the piece work system of incentive pay.

Thus, in summary, employees, before, earned an average $11.54 an hour; under gainsharing, earnings would be $9.71 an hour, plus whatever incentive pay was earned under that plan.

The union, wary of the company's proposal on gainsharing, asked for (and later got) "safeguards", including limiting the Gainsharing Plan to a one year trial basis, periodic review of the plan, posted notices on plan results and "red-circling" earnings of employees for the first two months after the Gainsharing plan was to be implemented.[1]

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[1] Article XXIV of the contract, as later agreed, is entitled "Gainsharing Plan". It provides in its entirety:

Section 1.

The Company shall discontinue the current incentive plan and implement a Gainsharing Plan which will provide the opportunity to earn more money than the incentive plan. The Gainsharing Plan will be implemented on a one (1) year trial basis. Either party may request, between sixty (60) and thirty (30) days prior to the end of the trial year, to meet and begin negotiations over revisions in the Gainsharing Plan. In the event that neither party requests to meet and begin bargaining, the Gainsharing Plan shall continue as is throughout the remainder of the agreement.

Section 2.

The Company will review the Gainsharing Plan with officers of the Local Union And, if requested, an IUE Representative, on a monthly basis. Prior to implementation Of the Gainsharing Plan, the Company will review the Plan with employees. The Company will post on the

Employees, in eight departments, make commercial batteries.

The eight departments are: (Grid) Casting; Pasting; Plate Cleaning and Plate Wrapping; Assembly, Stack/Burn, Stow; Assembly Covering Air Test; Charging (also known as Formation); Finishing; and Shipping.

Under the Gainsharing Plan (Attachment C), performance is measured in four categories: Quality; On-time Delivery; Health and Productivity.

The parties agree that for the purposes of this dispute measuring quality of performance dominates in determining entitlements to incentive pay under gainsharing.

Plant operations were described most by Mr. C. Burkhart, Plant Manager until just after the parties agreed on the collective bargaining agreement and a very active participant for the company in negotiations leading to the contract.

The first operation is in the grid casting department. According to Mr. Burkhart "...we receive raw lead and - we call them pigs, a pig if it weighs sixty-five pounds, it's a hog if it weighs two thousand, but we take this lead and we throw it into a lead pot and it melts the lead, and then that lead is then gone through a casting machine to make a grid". Tr. 34, et seq.

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bulletin board a monthly report showing the monthly results for the Program.

Section 3.

When the Gainsharing Plan goes into effect, it will be phased in by "red circling" employees' earnings for a period of two (2) months. During this two (2) month period, employees shall be paid at the rate of their average earnings over the last two (2) months. After the phase in period, the one (1) year trial period begins.

The parties agree that "Attachment C" is part of the contract. It is entitled "Gainsharing Program". As relevant to this dispute, it will be reviewed below.

The pig or hog melted in the lead pot is poured into molds known as grids.

Lead in grids can have defects including missing wires, too much flash (also known as "head"), be too heavy or too light or too thick or too thin. Tr. 39. If a grid has one of those defects: "It should be going back into the lead pot to be re-melted" Tr. 40.

On the question (from union counsel) - whether the recycled lead is considered to be scrap, Mr. Burkhart responded that there is a loss - in time and capacity. Scrap to him is based on whether the item - grid in this instance - makes it into inventory. If the grid is defective and is thrown back into the melting pot "it would not have been reported as good production to affect inventory". Tr. 40.

Further according to Mr. Burkhart, if a quality assurance employee finds defects in a grid already on a pallet - presumably placed there by the grid-casting operator as good production - it would be considered to be in the inventory. Similar to grids with defects after the initial pouring of the lead and which are returned to the lead pot, those grids already on pallets as good production would also be put back into the lead pot for remelting. In that case a "scrap ticket" would be written to relieve inventory.

In either case - defects found upon initial pouring of lead or which are found to have defects by quality assurance personnel after the grid casting operator has placed the grid on a pallet indicating good production for further processing - they are considered by Mr. Burkhart to be scrap because: "It's a loss of time and equipment capacity". Tr. 41.

Further on grid casting operations, David M. Bunker, union witness, classified as a grid caster for this company for 21 years, identified several causes for bad grids in his department including plugged air vents, defective ball and seat in the dispense cup that governs the flow of lead into the

ladle resulting in big "head" or little "head"[2] which must be remelted, worn bushings in receiving fingers which catch the grid, tilting grid contents and resulting in distortion in the grid. Mr. Bunker attributed all such causes for bad grids to machine - not operator - failures or defects which, according to him, the company considers to be scrap and counts them in calculating First Pass Yield. He estimated that machine-caused bad grids, which are "throwed on the scrap conveyer and goes back into the pot - recycled" amounted to 20 to 40 per cent of his production of grids. Tr. 252.

The negotiating history of Article XXIV on the Gainsharing Plan, on the question whether plant FPY was to be determined by averaging or multiplying in each department, is inconclusive.

Negotiators on each side were high ranked and experienced. They did not specify in the contact or any agreed writing which system was applicable.

Union negotiators rely, on a purported statement by Mr. Burkhart in one negotiating session that an average of 92 per cent had to be achieved in all departments for employees to be eligible for incentive pay - at the maximum level.

Company negotiators rely on company minutes at a negotiating session during which a union negotiator asked if gainsharing consisted of department first pass yield. To this question, a company negotiator responded that total plant yield was the yardstick, which was measured department, times department, times department, et cetera.

The company argues with some persuasion that history influences the present that FPY had been calculated previously by department using the multiplier means of calculation which method of calculation was continued under the newly installed gainsharing incentive pay plan - a

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[2] The witness explains "head" to be excess lead poured into the grid which is cut off the top of each grid. This excess lead, which is recycled, amounts to 30 to 50 per cent of the grid. The company considers this excess lead to be scrap. Tr. 252 - 253.

condition which experienced union negotiators knew, or should have known, according to the company.

But reliance on such history does not make the case for the company that the union's grievance should be denied.

Previously, under the piece work incentive pay system, it made little or no difference in calculating incentive pay, what the FPY experience was in each department - particularly the grid casting department (which both union and company witnesses agree amounts mostly for low percentages, under either average or multiplier systems of calculation). FPY in each department could be significant historical information for management planning purposes but not for incentive pay. Thus, it cannot be accepted that the union is foreclosed from attacking the multiplier plan for calculating FPY. Also, it cannot be passed that, after almost a year of calculating under the Gainsharing Plan, in only three months have employees received incentive pay - a total of $350 for each employee - at the lowest level of eligibility - and that each employee under the new incentive plan is making about $2.00 less an hour than before.

As the union argues, it cannot responsibly have accepted a new contract with substantial pay cuts under an untried incentive pay plan if it know or had good reason to believe that the company's plan to determine FPY under the new interdependent system, with deductions in FPY for findings of defects by quality assurance personnel or because of "Related Measures" (Attachment C) would almost certainly assure sharply reduced or non-existent pay incentives.

Sympathy for a disappointed party in interpreting an agreement it made is not the point; it is only to establish that the facts under which FPY were determined before are materially different now, hence there is no past practice or precedent on which the company can rely in its overall argument that FPY must be determined the same as before.

Miscalculation, or not, of First Pass Yield remains the focus of this dispute.

The answer to that question turns on what information is to be capitalized in determining FPY under the department, times department, means of calculation.

There is no serious difference of opinion between the parties that FPY in the seven departments following grid casting is consistently in the mid or high 90 per cent level of efficiency. Only if FPY in grid casting reaches 85 per cent and assuming that FPY is at 100 per cent in each of the other departments could any employee in those departments earn incentive pay.

In the grid casting department, counting head and machine-responsible recyclable lead as scrap cannot meet the test of how to determine FPY in that department.

Unlike sequential departments where employees have an in and out product which they can make worse by poor performance, grid casters get a product - lead - over which they have no dominion. A gainsharing plan designed specifically to induce employees to produce better products cannot reasonably include factors over which the operator has no influence. Grids placed on pallets by grid caster operators which include defects found by quality investigators or by employees in sequential operations should of course be counted against the FPY for that department. But no otherwise.

In the Gainsharing Program (Attachment C) First Pass Yield for Grid Casting is defined as: Good Product minus External scrap, divided by Counter measure number.

In that formula, the numerator is "Good Product". That is a number. The operator enters that number on a production report. That number can be revised down under "Related Measures" findings or upon findings by quality assurance personnel that grids on pallets – i.e. cleared as good product by the grid casting operator - have defects. That number however does not include head or lead which does not fill grids, even if caused by mechanical failure over

which the operator has no control.[3] The company does not now take that circumstance into account - as it should.

Still in the numerator of that formula: external scrap is product identified in M90 reports by operators in "subsequent" processes.

The denominator in that formula is the counter which is attached to the grid casting machine "and counts each ladle pour as it is made".[4]

Either because a ladle pour in context, can be inferred to be defect - free to count for purposes of FPY in the grid casting department, or because "External Scrap", by definition, is matter found by operators in subsequent processes, defects in lead pours or because of malfunctioning machines cannot reasonably be charged to the grid casting department in determining FPY in that department and thus the plant. In those circumstances, the grid casting operator cannot influence the quality of the product. An incentive pay system designed to induce better quality work by employees cannot stand if the employee has no means by which to improve his work.

It is also pertinent in judging how FPY is to be determined in the grid casting department that the company through its negotiators committed to allowing operators to shut down equipment if defects - as in lead pour - were evident. Testimony by union witness Bunker (Tr 250, 251), which was not rebutted by the company, that supervisors - one supervisor was specifically named - instructed operators

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[3] Present plant manager - Doyle Thresher testified that in grid casting bad grids because of machine error are calculated for First Pass Yield. Tr. 362, 363. (He also testified that In grid casting now, the percentage of good product is "much improved".) Tr. 364

[4] In grid casting, Mr. Thresher explained: "The way it works is we have a meter on and we count the number of pours, how many times it dispenses. That gives your baseline, the total number of dumps or pours. Then you take the number of good grids, minus the reject rate and that's how you get First Pass Yield." Tr. 364

to not shut down equipment in those circumstances is further reason not to accept as scrap defective lead pours or product of malfunctioning machines in determining FPY in that department.

On all circumstances, the multiplication of FPY experience in each department is the means by which to determine plant First Pass Yield, but in applying that system of calculation in an incentive plan to improve employees' quality of performance, the company miscalculated FPY, particularly in the grid casting department, by counting as "scrap" pours of defective lead or defects due to mechanical failure over which the operator has no control.

Employees being paid about $2.00 an hour less than before, which is a pay reduction of about 16 per cent, or the company retaining about $100,000 a month because of reduced incentive pay, as the union concludes, without rebuttal by the company as to that money effect in experience under gainsharing, with improvement in efficiency in all departments, including grid casting, is not a testimonial to how the parties intended that incentive pay plan to work under a contract agreement in Article XXIV, Section 1. that discontinuance of the piece work incentive plan and adoption of the Gainsharing Plan "will" provide an opportunity to earn more money than under the piece work incentive plan.

The company's miscalculation of FPY needs adjustment. Back pay is justified. For purposes of First Pass Yield under the Gainsharing Program, the company may use the multiplier system of calculation, but it shall not count defect in products over which the operator has no control.[5]

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[5] Requirements in Article XXIV, Section 2 for informational meetings on the planned operation of the Gainsharing Plan, the requirement to periodically post reports showing the results of the program, which the union bitterly complains the company violated, as well as the union's plaintive call for the arbitrator to draw adverse inferences against the company for refusing or unduly delaying providing requested information on plant calculations, are not considered in this

V. REMEDY

The matter of remedy is very difficult.[6]

The concentration by each party in preserving evidence during arbitration hearings and in post hearing briefs was on the merits.

Back pay is justified in his dispute, but not on the average method of determining First Pass Yield, as the union argued. The company passed the matter in the belief it had properly calculated First Pass Yield.

The case will be considered to have been bifurcated as between liability and damages.

The arbitrator retains jurisdiction of this dispute to determine appropriate back pay in accordance with the following terms.

Unless within 45 days from the date of this opinion the parties agree on a plan for back pay, new hearings before this arbitrator will be held to determine appropriate back pay. In the event new hearings are required it - or they - will be told very soon after said 45 days, the date to be selected by the arbitrator in the event the parties do not agree - with concurrence by the arbitrator - on a set date for such hearings.

VI. DECISION

The union's class action grievance that the employer violated Article XXIV, Section 1. Of the collective bargaining agreement in determining percentages for First Pass Yield is sustained.

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opinion because those matters were not part of the union's grievance, as they were required to be under Article XIII, Section 1. of the collective bargaining agreement or they were matters to be considered by the National Labor Relations Board as an Unfair Labor Practice charge.

[6] Note is taken of the parties' agreement in Article XXIV, Section 1. to re-open consideration of the Gainsharing Plan.

The union's request for remedy in its grievance that percentages for First Pass Yield be determined by using the average of all departments is denied.

On the merits, the company violated Article XXIV, Section 1. of the collective bargaining agreement. It is obliged to pay back pay to bargaining unit employees covered in the class action grievance. That amount is to be determined either by agreement of the parties or by this arbitrator who maintains jurisdiction of this dispute following new hearings, if necessary.

The union's grievance was not patently frivolous. It was not frivolous. The employer's request for costs and attorneys' fees is denied.

SO ORDERED.

\s\ _____
Robert J. Ables
Arbitrator

Dated: May 14, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: September 19, 2000
ENTERED: September 19, 2000

No. 00-1019
CA-99-2003-4-22

YUASA, INCORPORATED
Plaintiff - Appellee

v.

INTERNATIONAL UNION OF
ELECTRONIC, ELECTRICAL,
SALARIED MACHINE AND FURNITURE
WORKERS, AFL-CIO, LOCAL 175

Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The Appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
CLERK